

Changing landscape for sexual minorities in India

Despite India's landmark "third gender" judgment earlier this year, human rights remain difficult for many sexual minorities. Dinesh C Sharma reports from New Delhi.

With its ruling granting India's transgender community of *hijras* legal status as a third gender, constitutional protection and rights, and affirmative action such as quota in government jobs, the Supreme Court has tried to set right historical wrongs done to this marginalised community since the colonial rule.

Hijras are usually born as males but their gender identity, gender expression, and behaviour does not conform to their biological sex. A minority also include intersex people. *Hijras* have long been a part of sociocultural tradition with mentions in historical and ancient religious texts, but during British rule they were denied civil rights and deemed to be criminals under the Criminal Tribes Act, 1871. Though the law was repealed in 1952, many local laws continued to reflect a prejudicial attitude towards this community. *Hijras* continued to be denied a formal identity and basic rights such as access to health care and government jobs, and are often subjected to stigma, discrimination, and harassment. Many of them survive by seeking alms from shopkeepers, parents of newborn babies, or by dancing at marriages. Some of them also engage in sex work.

The Court ruling has been widely welcomed as a progressive step. However, the legal situation is not straightforward for this group and other sexual minorities. Although self-determination of gender identity and sexual orientation have been included in the category of basic human rights, same-sex sexual relations by consenting adults remains a criminal act. Additionally, some sexual minorities feel that the Supreme Court verdict will benefit only traditional trans feminine communities.

Visible invisibles

"We were the only visible sexual minority under the LGBTQI [lesbian, gay, bisexual, transgender, questioning, and intersex] umbrella yet were treated as invisibles within the community. We thus face double stigma and discrimination", said Laxmi Narayan Tripathi, a transgender activist who was an intervener in the case. "We need to understand to what extent

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social exclusion based on identity is impacting our right to property and inheritance, denial of access to health care and welfare schemes, issuance of identity cards, and livelihood options."

The Supreme Court judgment will hopefully help solve such problems. The court has ruled that recognition of a person's gender identity is a fundamental right under the Indian Constitution. "Determination of gender to which a person belongs is to be decided by the person concerned. Gender identity is integral to the dignity of an individual and is at the core of personal autonomy and self-determination", the ruling said.

At present, transgender people are forced to identify themselves either as male or female in different official identity documents, and are subjected to humiliating acts like stripping or body checks, and made to undergo medical tests to prove their declared identity. Now such individuals will be

recognised as third gender, allowing their sense of gender identity to match official identity without being subjected to medical examination or need to provide proof of sex re-assignment surgery.

"Gender variant people (whether they identify themselves as third gender or male or female) are now free and equal", explained Tripti Tandon, a member of New Delhi-based rights group, Lawyers Collective. "The judgment lays down that persons who do not conform to a binary gender of male and female, as well as those who identify themselves in a gender opposite to the one assigned to them at birth, can identify, live, and relate to the world in their preferred gender. And this self-identified gender will have to be recognised by the state."

Splitting the community

The ruling, however, is being interpreted differently by sexual minorities other than *hijras* and by other courts. This is because of explicit mention in the Supreme Court judgment that while all persons irrespective of their gender identity are equal in the eyes of the law, specific rights and entitlements granted by the court apply only to male-to-female transgenders or *hijras*.

"It [the judgment] is narrow in the sense that it does not address the entire trans community but only traditional trans feminine communities. The scope of the judgment should have covered the entire trans community so as to ensure that trans masculine, intersex, and intergender communities are equally represented and the centre and state governments do not interpret it differently", felt Satya, a member of South Asian Human Rights Association for Marginalized Genders and Sexualities (SAHRA).



Indians protest about Section 377, which criminalises same-sex sexual relations

"The very understanding of gender in the government and courts continues to remain binary and that which is neither male or female (according to them), falls in the category of transgender, which is very unfortunate."

The apprehension of people like Satya seem real if a recent verdict of the Madras High Court relating to dismissal of a police constable from service on the grounds of being transgender is any indication. The court reinstated the person in her job but observed that in the Supreme Court judgment "male-to-females (MTFs) are to be treated as transgender for the purpose of safeguarding their rights under the constitution. The other transsexuals such as females-to-males (FTMs) will not have the benefit of the classification as third gender. Therefore, even after the SC [Supreme Court] judgement, there is a legal compulsion that these FTMs are to be brought within the binary classification as male or female. If they are not brought under this binary classification, then, they will be deprived of the fundamental rights".

Legal experts, however, point out that principles laid down by the Supreme Court apply to all gender variants. For instance, Tandon says, in the case of a person born female who identifies themselves as male the important part of the ruling is

the conditions she needs to fulfil to be recognised as male. "Here the court has clearly said that medical or surgical intervention is not necessary and that what matters is psychological or self-identified gender."

Section 377

Another troubling situation resulting from the ruling is that while all rights and entitlements have been granted to the transgender community, its members could still face legal action since gay sex remains a criminal offence under Section 377 of the 150-year old Indian Penal Code. In 2009, the Delhi High Court had decriminalised adult consensual gay sex. But this verdict was challenged

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by some individuals and faith-based groups in the Supreme Court, which in December, 2013, reversed the landmark order of the High Court.

"To say that gay men also get included in the present judgment of the Supreme Court would be dangerous because though the judges have remarked that Section 377 was 'misused and abused', the sad part is that they have not declared 377 unconstitutional or struck it down as a consequence. Thus gay men, despite the umbrella protection conferred on SOGI [sexual orientation and gender identity] minorities are still criminalised", asserts Ashok Row Kavi, chairperson of Mumbai-based gay rights group, Humsafar Trust. Activists like Kavi hope the Supreme Court, which is currently hearing a curative petition on the 377 verdict, will now re-examine the issue in view of the latest ruling recognising a third gender.

Health concerns

India's new central government led by right-wing Bhartiya Janata Party (BJP) is yet to make its position clear on Section 377. Top leaders of the party in the past have supported continuation of this controversial clause.

It may take time for necessary changes to be made in different laws and to initiate administrative action to implement the court order on the third gender. Among other things, the government has been asked to open separate HIV serosurveillance centres for *hijras*, besides providing medical care to address conditions like depression and gender identity disorder. A 2010 assessment by the UN Development Programme had indicated the HIV prevalence was between 17.5% and 41.0% among transgender groups and *hijras*. The official HIV prevention programmes reach out to *hijras*, but they are considered under the category of men who have sex with men.

Hijras face several health problems other than HIV. "Many transgender persons may want to undergo sexual reassignment surgery but these procedures are expensive and not carried out in most government hospitals. As a result, they are forced to go to quacks or opt for castration which is often carried out under unhygienic and unsanitary conditions", according to Tripathi.

As a first step, all transgender populations in different states will have to be mapped so that appropriate social and economic interventions can be designed. Unofficial estimates put the *hijra* population in India at 1 million. At present, just one state—Tamil Nadu—has a separate welfare board for transgender communities to let them access government services and benefit schemes. Another state, Madhya Pradesh, announced plans for a similar board after the Supreme Court verdict. The road to equal rights will undoubtedly be a long one for India's sexual minorities.

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